WP(C) 3447/2007

BEFORE

HON'BLE MR. JUSTICE AMITAVA ROY

JUDGMENT AND ORDER (ORAL)

As agreed to by the learned counsel for the parties, the writ petition and the miscellaneous case have been analogously heard for final disposal. In challenge is the allotment of the construction work of CGI Market, at Hatkhola, Nalbari in Ward No. 6, under the Nalbari Municipal Board (hereafter for short referred to as the 'Board'), in favour of the respondent No. 8. This Court, while issuing notice of motion on 11.07.2007, in the interim, directed maintenance of status quo in connection therewith.

2. I have heard Mr. D Choudhury, learned counsel for the petitioner and Mr. RK Bora, learned State counsel for the State respondents. Also heard Mr. DC Mahanta, Senior Advocate assisted by Mr. TJ Mahanta and Ms. P Bhattacharrya, Advocates for the respondent No. 8.

3. The case of the petitioner briefly stated, is that in response to the Notice Inviting Tender (hereafter for short referred to as the 'NIT'), for the aforementioned work, he along with some others including the respondent No. 8, submitted their tenders on 26.12.2006. After opening the tenders received in the presence of the bidders and their representatives a comparative statement was prepared by the Tender Scrutiny Committee of the Deputy Director of Town and Country Planning, District Office, Nalbari, Assam of which the Chairman, Municipal Board, Nalbari and one Junior Engineer, Town and Country Planning, Government of Assam, were also members. In the statement so prepared, the bids quoted amongst others by the petitioner and the respondent No. 8, were recorded to be Rs. 9,59,807/- and Rs. 10,16,814/-, respectively. Judged by the offers made, the petitioner was the lowest bidder and by that measure, the respondent No. 8, was sixth in the order. The petitioner was thus, under the bonafide expectation that the work involved, would be allotted to him. As a decision, according to him, was getting delayed, he made necessary inquiries and eventually came to learn that at by the letter dated 25.04.2007 of the Deputy Secretary, Government of Assam, Urban Development (T) Department, the work had been awarded to the respondent No. 8, at his quoted bid of Rs. 10,16,814/-. The Director, Town and Country Planning, Assam by his letter dated 11.05.2007, had thereafter requested the Deputy Director, Town and Country Planning, District Office, Nalbari to take necessary action in terms of the allotment made. While contending that the work order had not been issued, the petitioner pleaded that the impugned action of preferring the respondent No. 8, to him, is patently illegal and arbitrary and compromise with the interest of public revenue.

4. The respondent No. 8, on receipt of the notice of the proceeding, by his application registered as M.C. No. 3291/2007, has sought vacation and/or modification of the interim direction, pleading principally that the petitioner's bid being below 10%, of the schedule of rates, it was clearly in contravention of clause 9 of the terms and conditions of the NIT, and thus per se rejectable. According to the said respondent, on receipt of tenders, the Deputy Director, Town and Country Planning, Nalbari prepared a comparative statement based thereon. Thereafter, on a scrutiny of all relevant records and the comparative statement on the benchmark of the criteria mentioned in the NIT, the Government decided to allot the work to him and accordingly, the Deputy Secretary, Government of Assam, Urban Development (T) Department, communicated the said decision to the Director, Town and Country Planning, Assam by his letter dated 25.04.2007. Thereafter, the Chairman, Nalbari Municipal Board, issued the work order on 08.06.2007, requiring him to start the works. The respondent has asserted that in terms of Clause 9 of the NIT, the petitioner's offer was not maintainable being below 10% of the schedule of rates. On the other hand, the bid quoted by him being not afflicted by such contravention, was rightly accepted on a consideration of all other relevant criteria.

The respondent has specified that the estimated value of work, as mentioned in the NIT being Rs. 10,66,558/-, on the application of Clause 9 of the NIT, the bids to be offered, could not have been lesser than Rs. 9,59,902.20/-. As admittedly the petitioner had quoted Rs.9,59,807/-, the same was non est vis-a-vis the said tender stipulation. The respondent alleged that the interim direction was obtained by withholding the fact that by then, the work order had been issued in his favour.

Noticing the relevance and bearing of Clause 9 of the NIT on the issue under scrutiny, this court required the Commissioner, Public Works Department to disclose the modalities to be applied for ascertaining the bids to be within or beyond 10% of the schedule of rates as per the Assam PWD norms. In his affidavit, in compliance of the above direction, the Commissioner and Special Secretary, Public Works Department, Government of Assam in substance clarified that though while preparing the tender documents, the authority concerned are required to identify the items that would be required for execution of the contract and the quantities thereof and the prices/rates as prescribed in the schedule of rates, are taken and the item wise prices are ascertained, while evaluation of the tenders, the total tender value is taken to identify as to whether those are below 10% thereof. In other words, to determine whether a bid offered by a tenderer is within or beyond 10% of the schedule of rates, it is the total value of the tender that is taken into account and not the individual item wise values quoted by the tenderer. The said authority emphasized that in each of the items as reflected in the schedule of rates, 10% profit margin for the contractors, is included so as to afford them a play in the joints to decide on a rate that they would be inclined to quote depending on the profit margin that they would seek to retain. The affidavit, discloses that 90% of the schedule of rates being the cost of the items in question, any lower rate would invariably signify compromise with the quality of works. Neither, the State respondents not the Nalbari Municipal Board has filed their affidavit.

5. Mr. Choudhury, has argued that the petitioner’s tender not having been rejected being repugnant to Clause 9 of the tender conditions, his offer being the lowest he ought to have been settled with the contract. There being no semblance of any rationale for preferring the respondent No. 8, with a higher bid, the impugned action is patently arbitrary and unreasonable and being antagonistic to the interest of public revenue, is liable to be adjudged, null and void. In the alternative, the learned counsel has urged that even if the rigour of Clause 9, has been relaxed in the instant case, the same not being prejudicial to public interest, the departure would not vitiate the process. The impugned settlement in favour of the respondent No. 8, being impaired by the want of fairness and transparency, it ought to be interfered with, he argued. Mr. Choudhury, placed reliance on the decisions of the Apex Court in G.J. FERNANDEZ Vs. STATE OF KARNATAKA & ORS. (1990) 2 SCC 488 and of this Court in M/S. ARUNDHUTI CABLES, AGARTALA & ORS. VS. STATE OF TRIPURA, 2001 (1) GLT 295 and in JAY BEE ENERGY SERVICES PVT. LTD. VS. OIL INDIA LTD. & ORS. 2002 (1) GLT 329.

6. In reply, Mr. Bora, has argued that the concerned State respondents having on a consideration of all relevant facts selected the respondent No. 8, for the execution of the work, this Court in the exercise of its power of judicial review, would not interfere therewith. The learned State counsel, also produced the relevant records pertaining to the impugned settlement.

7. Mr. Mahanta, has contended that as the petitioner’s offer on the face of the record, is below 10% of the schedule of rates and thus impermissible under Clause 9 of the terms and conditions of the tender, he is obviously ineligible to be considered for the settlement and, therefore, his challenge to the selection of the respondent No. 8, is plainly untenable. The learned Senior counsel relied on the decision of the Apex Court in RAUNAQ INTERNATIONAL LTD. VS. I.V.R. CONSTRUCTION LTD. & ORS. AIR 1999 SC 393.

8. The arguments advanced have been duly evaluated. There is no wrangle at the Bar with regard to the incorporation of Clause 9 in the terms and conditions of NIT and the rates quoted by the parties for the work in question. Eleven tenderers submitted their bids, the lowest being that of Sri Amarendra Sarma (Rs. 9,15,122.69/-) and highest that of the respondent No. 8 (Rs.10,16,814/)-. The petitioner offered Rs.9,59,807/-. Clause 9, required that the quoted rates below 10% of the schedule of rates would not be considered to maintain the quality of works. In terms of the affidavit, filed by the Commissioner & Special Secretary, Government of Assam, Public Works Department, the margin of 10%, is to be computed with reference to the total tender value. According to the respondent No. 8, the estimated value of the work being Rs. 10,66,558/-, by applying the said norm, the cut off figure arrived at is Rs. 9,59,902/-. To state otherwise, any offer for the works involved, lower than Rs. 9,59,902/-, would plummet below 10% of the schedule of rates referred to in Clause 9 to be rejected, as unentertainable. Consequently, any tender carrying an offer less than 9,59,902/-, cannot demand consideration for selection.

9. The records produced, contain the comparative statement prepared by the Tender Scrutiny Committee, following the examination of the tenders and evaluation thereof. It adjudged the tender of one Sri Jagadish Baruah as irregular and that of Sri Amarendra Sarma with an offer of Rs. 9,15,122.69/-, as unacceptable being not accompanied by the earnest money as required and for quoting a rate below 10% of the schedule of rates. The tenders alongwith the comparative statements and other relevant records, were thereafter forwarded by the Director, Town and Country Planning, Assam to the Commissioner and Secretary, Government of Assam, Urban Development (T) Department.

The related note dated 01.03.2007, disclosed that tenders of nine (9) bidders except the two abovenamed, were submitted for consideration for final selection. The authority concerned ordered that the highest bidder amongst the lowest bidders in each group, may be given the allotment. The reference of other groups is understandable, as by the same NIT, tenders for three categories of works, had also been invited. Presumably, therefore, the respondent No. 8, was awarded the settlement.

The logic of selecting the highest bidder amongst the lowest bidder, appears to be wholly unintelligible. Noticeably, no rate below Rs. 9,59,902/-, had been rejected by the Tender Scrutiny Committee. The Committee, therefore, construed the offers of the nine tenderers except that of Sri Jagadish Baruah and Sri Amarendra Sarma to be valid. Not only the records are silent about the reasons for discarding the petitioner’s offer though lower than that of the respondent No. 8, the respondent authorities seem to have overlooked other tenders as well. The records do not disclose any computation to fix a cut off figure below which an offer if made, would be hit by Clause 9 of the tender conditions. Even, assuming that the calculation provided by the respondent No. 8, is acceptable and, therefore, any rate lower than Rs.9,59,902/-, would fall below 10% of the schedule of rates, there is no reason why the offer of one Md. Munnaf Ahmed at Rs. 9,59,913.78/-, could have been overlooked by the respondent authorities being lesser than that of the respondent No. 8, but above Rs. 9,59,902/-.

This assumes importance in the context of State revenue and in absence of any finding that settlement at a rate below that of the respondent No. 8, would have compromised with the quality of works. From the factual inputs gatherable from the records, it is therefore, not possible to conclude that the petitioner’s tender in terms of the computation made by the Tenders Scrutiny Committee, was rejected being in contravention of Clause 9 of the tender conditions. The rejection of the tender of Sri Amarendra Sarma, quoting Rs. 9,15,122.69/-, inter alia on the ground that the same was below 10% of the schedule of rates demonstrates the awareness of the said Committee about the relevance and applicability of Clause 9 of the tender conditions. It can, therefore, be reasonably inferred that in its comprehension the rates offered by the nine surviving tenderers were not incongruent with the prescription of Clause 9 of the tender conditions. The respondent authority in awarding the contract, also did not hold a different view. The

decision of the Apex court in RAUNAQ INTERNATIONAL LTD. (Supra), in this premise, does not advance the case of the respondent No. 8.

10. The Apex Court in G.J. FERNANDEZ (Supra), inter alia ruled that any non-conformity with or relaxation of the prescribed standard allowed in case of an intending tenderer, if does not result in substantial prejudice or injustice to any of the parties or to public interest in general, the same would not render the associated process invalid. This Court in M/S. ARUNDHUTI CABLES, AGARTALA & ORS. (Supra), subscribed to the same view. The facts and circumstances of the case do not reveal any relaxation in the rigour of Clause 9.

11. This Court in JAY BEE ENERGY SERVICES PVT. LTD. (Supra), enunciated that though, the lowest bidder may not have an enforceable right to get the contract, but ordinarily the authorities concerned should accept the lowest bid and in case of non-acceptance thereof, good reasons must be disclosed to establish that the rejection thereof, is in public interest. No such reason is discernible in the records.

12. In the above view of the matter, the challenge to the award made in favour of the respondent No. 8, merits acceptance. Accordingly, the allotment of the construction works of CGI Market, at Hatkhola, Nalbari in Ward No. 6, under the Board in his favour, is hereby set aside. The matter stands remanded to the Commissioner and Secretary Government of Assam, Urban Development (T) Department, Guwahati to re-examine the issue take an appropriate decision strictly in accordance with the tender conditions and all other relevant materials on record. The said authority, if deemed necessary would interact with the official functionaries involved in the process and decide in the background of the attendant facts in accordance with law. As the works involved, relate to a public project, the exercise indicated hereinabove, should be completed within a period of two (2) weeks from the date of receipt of the certified copy of this order.

In the result, the writ petition is allowed and the miscellaneous case is rejected. No costs.